Supreme Court, U.S.
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No. 93-752

In The

Supreme Court of the United States

October Term, 1993

CARLOTTA MITCHELL,

Petitioner,

vs.

ALBUQUERQUE BOARD OF EDUCATION, d/b/a ALBUQUERQUE PUBLIC SCHOOLS, LILLIAN BARNA, JOE GROOM and JOHN MONDRAGON,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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December 17, 1993

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REPLY

1. Important Question of Federal Law.

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982), involved an important matter of Federal law. The *extension* of *Kremer* to a non-Section 706 administrative proceeding, barring Title VII relief in Federal court for race discrimination and sex discrimination and harassment claims is *likewise* an important question of Federal law, which seriously affects Federal statutory rights under Title VII.

The ramification of *Kremer* and its extension to non-Section 706 administrative proceedings affects the choice of administrative versus Federal court forum drastically – adverse decision[1] to Petitioner militates avoidance of state administrative proceedings, or exhaustion thereof. Plaintiffs' attorneys are encouraged *to discourage* administrative proceedings in favor of pursuing only the Federal court forum: doubtless many litigants each year avoid state administrative relief so as not to risk issue and fact preclusion in Federal court.

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[1] The Tenth Circuit Court of Appeals, by General Order, November 29, 1993, suspended 10th Cir. R. 36.3, thus permitting citations of unpublished opinions and orders if it is believed that the order has "persuasive value with respect to a material issue in a case and would assist the court in its disposition . . . [, and] provided that a copy of the decision is attached to the brief. . . . "

2. Circuits are Divided on Application of *Kremer* to Non-Section 706 Court-Reviewed Administrative Proceedings.

The Tenth Circuit, in the instant case, hold that the *Kremer* rule extends to court-reviewed non-Section 706 administrative proceedings.

The Second Circuit, in *Hill v. Coca Cola Bottling Co. of New York*, 786 F.2d 550, 554 (2nd Cir. 1986), decided that *Kremer* does *not* apply to non-Section 706 cases: "Moreover . . . [*Kremer* does not govern because] New York has a separate agency for hearing discrimination complaints . . . [,therefore] complainant could not have foreseen . . . bar [of] a subsequent anti-discrimination complaint."

The Eleventh Circuit, in *Carlisle v. Phenix City Board of Educ.*, 849 F.2d 1376, 1380 fn. 3 (11th Cir. 1988), also determined that *Kremer* does not apply to non-Section 706 cases: "This case differs significantly from *Kremer . . . [which involved a Section 706] New York administrative proceeding. . . .* "

3. Full Faith and Credit is Not Contravened.

There is no affront to a state court under Full Faith and Credit when a Federal court refuses to grant preclusive effect to a non-*de novo* state court affirmance or "rubber stamp" review of administrative determination per *administrative regulations.*

4. The Tenth Circuit Decision Blatantly Conflicts with Precedent of this Supreme Court in *McDonald v. Santa Fe Trail Co.*

There were no findings in the record whatsoever, one way or the other, as to racial discrimination. **Specifically,**

this Supreme Court held in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), that *a finding of cause for termination from employment does not by inference constitute adverse decision on a race discrimination claim.*

5. *Kremer*, and Extension of *Kremer* to Non-Section 706 Proceedings, Contravene Principles of Federalism, Comity and Finality.

Litigants are encouraged under *Kremer* to avoid state administrative proceedings altogether for fear of issue preclusion; or to attempt a clever "two-bite at the apple" maneuver of utilizing agency proceedings to see what they can get, then bypassing *de novo* or non-*de novo* review in state court where the matter could be ultimately resolved, and then filing a Title VII claim in Federal district court.

Respectfully submitted,

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